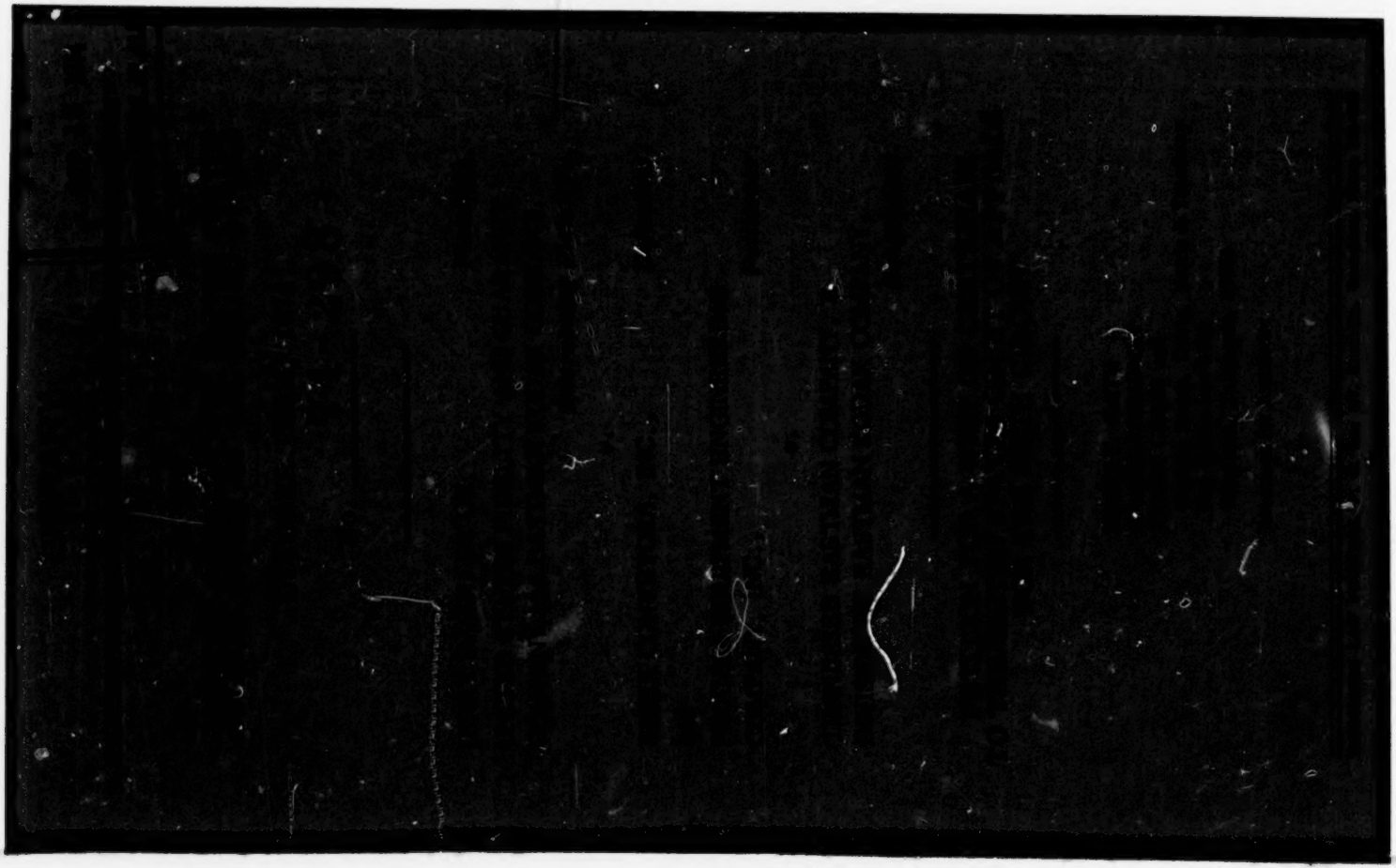

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

JERRY DAWN, ET UX,

Plaintiffs,

UNITED STATES FIDELITY AND GUARANTY COMPANY and EASTMAN KODAK COMPANY,

Intervening Plaintiffs,

v.

ESSEX CONVEYORS, INC.,

Defendant,

and

PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,

Petitioner,

v.

TENNESSEE EASTMAN COMPANY, A DIVISION OF EASTMAN KODAK COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Process Equipment Engineering Company, Inc., respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 20, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit appears in 498 F.2d 921 (6th Cir. 1974), and is reprinted in the Appendix hereto. The opinions of the United States District Court for the Eastern District of Tennessee are not reported. They are reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 20, 1974. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Tennessee Workmen's Compensation Act, *TCA* §50-908, *et seq.*, allows a third party action for indemnity against the employer of the injured party where the third party was merely passively negligent, but the employer was actively negligent in causing the injury.

STATUTORY PROVISIONS INVOLVED

TENNESSEE CODE ANNOTATED, Title 50, Section 908 – Right to Compensation Exclusive.

"The rights and remedies herein granted to an employee subject to the Workmen's Compensation Law on account of personal injury or death by accident, including a

minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death."

TENNESSEE CODE ANNOTATED, Title 23, Section 3102 – Right of Contribution Among Tortfeasors -- Exceptions -- Subrogation -- Indemnity.

"(a) . . . no right of contribution shall exist where, by virtue of . . . immunity under the workmen's compensation laws of the state of Tennessee, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought."

* * *

"(f) This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

STATEMENT OF THE CASE

Petitioner prays for a writ of certiorari to issue to the Sixth Circuit Court of Appeals to review its final judgment affirming the decision of the District Court for the Eastern District of Tennessee. For purposes of identification, the sole petitioner, Process Equipment Engineering Company, Inc., will be referred to as "Process", the respondent, Tennessee Eastman Company, as "Eastman" and Essex Conveyors, Inc. as "Essex". Jurisdiction was based on diversity of citizenship.

The original action grew out of a products liability action involving personal injuries. Jerry Dawn and wife, Wanda Dawn, filed a complaint for personal injuries on October 18, 1971 against Essex. Process was subsequently made a party defendant. The complaint alleged, among other things, that Process negligently manufactured, designed and sold to Eastman a "senior skip hoist dumper" which was to be used by Eastman in its filament processing operation at Kingsport, Tennessee; that on December 15, 1970, the plaintiff, Jerry Dawn, while in the employment of Eastman, was injured when the dumper portion of the hoist fell on him; that Process was negligent in designing a dumper without secure locking devices and without an enclosed gear unit to protect the chain drive mechanism from becoming contaminated with filament or fibers; that Process was strictly liable in tort to the plaintiff; and that Process was guilty of tortious misrepresentation and breach of warranty.

Process filed an answer and amendments thereto denying that it was guilty of any negligence which proximately caused the accident and resulting injuries. It also denied the allegations pertaining to strict liability, tortious misrepresentation and breach of warranty, and averred that the proximate cause of the accident was the negligence of Eastman and/or Jerry Dawn.

On June 15, 1972, Eastman and United States Fidelity and Guaranty Company filed an intervening complaint against Process seeking to recover workmen's compensation benefits heretofore paid by them to Jerry Dawn.

Subsequently, Process filed a third-party complaint against Eastman seeking indemnity on the theory of active-passive negligence. The third-party complaint alleged specific acts of active negligence by Eastman in ordering,

inspecting, erecting, altering, maintaining, and supervising the operation of the equipment and machinery in question.

Eastman filed answers to the third-party complaint and then moved the court for judgment on the pleadings or, in the alternative, for summary judgment. In its memorandum opinion, order and judgment on decision filed March 19, 1973, the District Court sustained Eastman's motion and dismissed the third-party complaint (Appendix A). Process, on April 3, 1973, filed a motion to alter and amend the judgment of the court seeking a certification of finality under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. The court did not act on this motion.

Process then filed a counterclaim for indemnity against Eastman. The counterclaim was incorporated by amendment to the pretrial order, and alleged that the active negligence by Eastman was the sole and proximate cause of the injuries to the plaintiff, Dawn; that Eastman possessed superior knowledge of the characteristics of the fibrous filaments which would be used in and around the dumper and of the propensity of the filaments to clog the machinery; and that Eastman negligently failed to advise Process of this fact. The counterclaim alleged that Eastman failed in its duty to advise Process of the nature of the filaments prior to the manufacture and sale of the machinery. Had Process been properly advised by Eastman, it could have manufactured, designed and sold machinery which could have been used safely by Eastman employees under the special working conditions anticipated and known by Eastman. Eastman failed to properly install, adequately inspect, maintain and operate the dumper. Eastman further failed to instruct and supervise its mechanics in the proper maintenance and service of the

machine. Eastman negligently and without the defendants' knowledge enclosed the machinery by a fence which prevented normal, safe, outside access to the machinery for repair purposes and forced Eastman's mechanics and repairmen to work beneath the suspended hoist of the dumper.

Eastman filed a motion for judgment on the pleadings or summary judgment to the counterclaim. The court sustained this motion and, by order filed September 6, 1973, dismissed the counterclaim (Appendix B).

The main claims and cross-claims came on for jury trial on October 1, 1973. On October 11, 1973, the plaintiffs and defendants announced to the court that all issues and controversies between the plaintiffs, Jerry and Wanda Dawn, and the defendant, Process, and the cross-claims between Essex and Process had been settled. The jury was discharged. A stipulation was entered into by the plaintiffs and the defendants in which it was agreed that the settlement would not affect the defendants' rights to appeal the order dismissing the counterclaims. The stipulation was entered by the court and filed.

Process filed on November 9, 1973 a motion requesting the court to certify as final its order of March 19, 1973 dismissing the defendant's third-party complaint. The court entered a final judgment on November 9, stating that all claims which Process had against Eastman and all claims which the plaintiff had against Process were "finally determined and otherwise disposed of". Simultaneous with its motion requesting certification, Process appealed from the order of March 19, 1973 and the order of September 6, 1973.

On November 12, Process again filed notice of appeal from the orders of March 19, 1973 and September 6, 1973 as finalized in the court's final judgment filed November 9, 1973.

On April 12, 1974, the appeal by Process was heard before the Sixth Circuit Court of Appeals. A final decision was filed on June 20, 1974, affirming the decisions of the District Court with regard to the third-party complaint and the counterclaim (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS, ACTING PURSUANT TO TO ITS AUTHORITY AS STATED BY *ERIE R. CO. V. TOMPKINS*, 304 U.S. 64 (1938), BASED ITS DECISION BELOW ON A CONCLUSION OF LAW WHICH IS CONTRARY TO WHAT THE PETITIONER BELIEVES THE SUPREME COURT OF TENNESSEE WOULD HAVE CONCLUDED HAD THE QUESTION BEEN PRESENTED TO IT.

The Court of Appeals for the Sixth Circuit held, in brief, that the Tennessee Workmen's Compensation Law, *TCA* § 50-908, *et seq.*, bars an action for indemnity based on the active-passive negligence theory by a third party against the employer of an injured employee who has sued that third party. By that action, the Court of Appeals has ignored the literal language of the Workmen's Compensation Act which makes no mention of excluding third-party actions for indemnity against the employer:

> "The rights and remedies herein granted to an employee subject to the Workmen's Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death." *TCA* § 50-908.

One of the earlier cases to construe the Workmen's Compensation Act in this context was ***Roberson v. Bitner***,

221 F. Supp. 279 (E.D. Tenn. 1963), wherein a federal district judge for the Eastern District of Tennessee held, contrary to the opinion of the Sixth Circuit Court of Appeals here, that the Workmen's Compensation Act did not preclude a third-party action for indemnity against the employer:

> ". . . The Tennessee Workmen's Compensation Law, *TCA* § 50-908 et. seq., does not bar these third-party actions if the respective third-party plaintiffs are found to be entitled to indemnity under some substantive right recognized by Tennessee law . . . . The . . . Workmen's Compensation Act does not encompass or limit the rights of third parties against the employer nor is there any reason why it should do so . . . . [The third party] should not be deprived of a right to seek indemnity from one actively responsible for the injuries simply because the employee's right to sue the employer is limited by the Workmen's Compensation Act . . . . [The third party] gains nothing by the Workmen's Compensation Act and, consequently, should not be deprived of a right which [the third party] would have under the . . . law." *Roberson v. Bitner*, *supra*, p. 281. *C. F. Lunderberg v. Bierman*, 241 Minn. 349, 63 N.W.2d 355, 365 (1954).

There are no reported cases where the Tennessee appellate courts have construed the Workmen's Compensation Act as it pertains to a third party's right to seek indemnification from an employer by means of a third-party complaint or a counterclaim. Several District Court cases have held contrary to *Roberson*, and the author of *Roberson* has since reversed himself. *Smith v. Illinois Central Railroad Company*, 263 F. Supp. 70 (M.D. Tenn. 1967); *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, 294 F. Supp. 704 (M.D. Tenn. 1968);

McCoy v. Wean United, Inc., Civil Action Nos. 3098 and 3099 (E.D. Tenn., filed April 25, 1974).

The Fifth Circuit Court of Appeals decision in *Trail Builders Supply Company v. Reagan*, 430 F.2d 828 (1970), follows the rationale of *Roberson v. Bitner*, *supra*, and involves a factual situation very similar to the case at bar. In *Trail Builders Supply Company*, *supra*, an employee was injured when he was drawn into a truss roll press being operated without an appropriate safety device. The employee alleged negligent construction of the press in a suit against the manufacturer. The manufacturer filed a third-party complaint seeking indemnity from the employer for damages it might be compelled to pay plaintiff.

The third-party complaint alleged specific acts of negligence on the part of the employer which proximately caused the employee's injuries. In the third-party complaint, the manufacturer alleged that it was guilty of only passive negligence and that the employer was guilty of active negligence in altering the safety devices which had been placed on the machine by the manufacturer. The employer moved for summary judgment on the ground that it was immune from liability by virtue of the exclusive remedy provision of the Florida Workmen's Compensation Act. The District Court denied the motion and entered an order authorizing the employer to petition the Fifth Circuit Court of Appeals for leave to appeal from the interlocutory order.

The Fifth Circuit Court of Appeals certified to the Florida Supreme Court the following question of law to be answered:

> Whether, under the law of Florida, an employer who has made payments of compensation and medical bene-

> fits to an injured employee under the Florida Workmen's Compensation Act may also be liable for indemnity to a passively negligent third party tortfeasor who has been sued for damages by the injured employee where it is alleged in the claim for indemnity that the employer's active negligence was primarily responsible for the injury, but the employer has invoked the exclusive remedy provision of the [Workmen's Compensation] Act. *Trail Builders Supply Company v. Reagan, supra.*

In construing a workmen's compensation provision very similar to the Tennessee provision, the Florida Supreme Court held that the Florida Workmen's Compensation Act did not preclude a third party tortfeasor from seeking indemnity from an actively negligent employer by means of a third-party complaint which alleges active negligence on the part of the employer:

> . . . Nothing indicates that manufacturer is or should be prohibited from seeking indemnity from employer. It is only the employer and employee, together with those claiming in lieu of the employee who are bound by this section. Other third parties are not bound. Manufacturer does not claim in lieu of or through employee. Its claim is direct against employer for an independent act of the latter which may result in damage to manufacturer. The statute affects only the rights and remedies of the employer and the employee. A passive tortfeasor's direct common law right of indemnity against the active tortfeasor is not mentioned. If it had been the legislative intent to abolish such right, it should have been spelled out with specificity and particularity. *Trail Builders Supply Company v. Reagan, supra*, at page 831.

The Tennessee Workmen's Compensation Act provides merely that the rights and remedies of the employee are exclusive, not that the liabilities of the employer under the Act are exclusive. By holding that the employer is insulated from an action for indemnity brought by a third party, the Sixth Circuit Court of Appeals has read into the Act that which is plainly omitted and thus has gone beyond its mandate as set forth in *Erie, supra*.

The general rules of statutory construction in Tennessee prohibit the expansion or enlargement of language in a statute which clearly limits its application to a particular class of cases. Tennessee has held that a court cannot construe a statute which is clear and unambiguous. Rules of construction are but an aid to construe a statute which is ambiguous and where words of a statute are clear and plain, they cannot be given another meaning by a judicial construction. *Montgomery v. Hoskins*, 222 Tenn. 45, 432 S.W.2d 654 (1968); *Anderson v. Outland*, 210 Tenn. 526, 360 S.W.2d 44 (1962); *Henry v. White*, 194 Tenn. 192, 250 S.W.2d 70 (1952). The Court of Appeals is likewise bound by these rules of construction.

This court has recognized these principles of statutory construction and has construed similar federal compensation acts to permit third-party claims of indemnity. *Ryan Stevedoring Co. v. Pan Atlantic SS Corp.*, 350 U.S. 124 (1956); *Weyerhauser S.S. Co. v. United States*, 372 U.S. 597 (1963). These cases, construing the Longshoremen's and Harbor Worker's Compensation Act and the Federal Employee's Compensation Act, respectively, prior to their amendment in 1972 and 1967, held that there was no evidence that Congress was concerned with the rights of unrelated third parties when it enacted each compensation act. The statutory remedy was exclusive only between the employer and its employees or their dependents.

The Florida State Legislature and the United States Congress, having recognized that their respective compensation acts did not preclude third party claims for indemnity, subsequently enacted amendments specifically barring claims for indemnity against employers. Despite this action by other legislative bodies, the Tennessee State Legislature has seen fit to retain its workmen's compensation provisions in the same form in which they were enacted. The right of the petitioner to seek indemnity from respondent stands unimpaired by any statutory law and should not now be impaired by the decision of the Court of Appeals.

It is also significant to note that, to the extent the Tennessee Legislature has spoken to this subject, it has expressly denied only the right to contribution, not the right to indemnity. *TCA* §23-3102 states, *inter alia*:

> "(a) . . . no right of contribution shall exist where, by virtue of . . . immunity under the workmen's compensation laws of the state of Tennessee, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought.
>
> * * *
>
> "(f) This chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

This statute stands as a clear indication that the Workmen's Compensation Act was never intended to bar an action for indemnity, regardless of the theory under which it is pursued.

II. THE COURT OF APPEALS, CONTRARY TO WHAT PETITIONER BELIEVES THE SUPREME COURT OF TENNESSEE WOULD HAVE CONCLUDED, CONSTRUED THE ACTIVE-PASSIVE NEGLIGENCE THEORY OF INDEMNITY TO REQUIRE A COMMON TORT LIABILITY BETWEEN A THIRD-PARTY PLAINTIFF AND A THIRD-PARTY DEFENDANT BEFORE INDEMNITY CAN BE HAD.

Tennessee recognizes the substantive right of indemnification. In the base decision of *Cohen v. Noel*, 165 Tenn. 600, 56 S.W.2d 744 (1933), the Tennessee Supreme Court established the premise that the party which has been guilty of passive negligence may recover indemnity from another party whose active negligence has exposed him to liability.

The Court of Appeals recognized that ". . . such actions are generally permitted under Tennessee law . . .", however, it disallowed petitioner's action for indemnity because the plaintiff in this action could not have directly brought a tort action against respondent. The Court of Appeals relied on a District Court case, *Chamberlain v. McCleary*, 217 F. Supp. 591 (E.D. Tenn. 1963), to hold that indemnity under the active-passive negligence theory is more like contribution and thus should be governed by the principles applied to contribution. The decision below is clearly contrary to the decision of the Tennessee Supreme Court in *Cohen*, *supra*. Although this form of indemnity is less familiar than indemnity arising from express or implied contract, it remains the judgment of the Tennessee Supreme Court that, in these cases, the equities require that the actively negligent party, rather than the passively negligent party, bear the entire loss. By holding contrary to the literal language of the Tennessee Supreme Court's opinion, the Sixth Circuit Court of Appeals has exceeded its mandate under *Erie*, *supra*.

It is conceded that there are no reported cases where the Tennessee Supreme Court has ruled on the requirements of the active-passive negligence theory of indemnity as it pertains to cases arising under the Workmen's Compensation Act. However, its decision to grant "indemnity" in cases involving active-passive negligence, rather than "contribution", should preclude the federal court's reconstruction of this remedy as "contribution".

The present action aptly demonstrates the rationale of the Tennessee Supreme Court. Here, the petitioner, possibly a passively negligent tortfeasor, is being held liable for an injury that was in reality caused by the active negligence of respondent. Under the decision of the Court of Appeals, the respondent can make the most extreme alteration of petitioner's product, withhold any information from petitioner, regardless of its importance to the design of the product, and still remain free from any responsibility to petitioner. It was just such blatant inequities that moved the Tennessee Supreme Court and others to develop the active-passive negligence theory of indemnity, which was, after all, an exception originally to the common law rule, developed from *Merryweather v. Nixon*, 8 T.R. 186, that there could be absolutely no indemnity or contribution among tortfeasors. To follow the decision of the Court of Appeals is to impose on the petitioner a burden contrary to that which would be imposed by the Tennessee Supreme Court.

Saying that any liability imposed on the petitioner must arise from active negligence is too facile. Such a rationale would have prevented the original development of the theory because under it, there could never have been a passively negligent tortfeasor demanding indemnity. Whether there is an active-passive dichotomy is for a jury to decide.

Only when the jury has rendered its finding of fact should the judge make the decision as to whether one party was passively negligent while the other was actively negligent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Of Counsel

September 16 , 1974

APPENDIX A

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

JERRY DAWN, ET UX.,
Plaintiffs,

v.

ESSEX CONVEYORS, INC., ET AL.,
Defendants and third-party plaintiffs,

v.

TENNESSEE EASTMAN COMPANY, ETC.,
Third-party Defendant.

Civil action no. 2809

MEMORANDUM OPINION AND ORDER

(Filed March 19, 1973)

The plaintiffs herein seek damages for personal injuries proximately resulting from a defect in equipment manufactured and sold by the defendants Essex Conveyors, Inc. (Essex) and Process Equipment Engineering
[fol. 2] Company, Inc. (Process). Essex impleaded the third-party defendant Tennessee Eastman Company, etc. (Eastman) for contribution or indemnification, and Process impleaded it for indemnification. Eastman moved for a judgment on the pleadings, Rule 12 (c),

Federal Rules of Civil Procedure, as to such third-party actions.

The third-party plaintiffs are entitled to proceed against the third-party defendant only if Eastman " * * * is or may be liable * * * " to them " * * * for all or a part of the [plaintiffs' claims] against * * * " them. Rule 14 (a), Federal Rules of Civil Procedure; *Gipson v. Shelley*, D.C. Tenn. (1963), 219 F. Supp. 915, 916. " * * * Rule 14 [*supra*] is strictly limited to situations where the very existence of potential liability in the third-party defendant is dependent upon the outcome of the action on the main claim. * * * " *Joe Grasso & Son, Inc. v. United States*, D.C. Tex. (1966), 42 F. R. D. 329, 333 [5], affirmed C.A. 5th (1967), 380 F. (2d) 749.

It is stipulated that at pertinent times the plaintiffs Mr. and Mrs. Dawn were husband and wife, and that the employment relation of Mr. Dawn and Eastman
[fol. 3] was subject to the provisions of the Tennessee Workmen's Compensation Law, T. C. A. §§ 50-901, et seq. The liability of Eastman to Mr. Dawn for an injury arising in the scope and out of the course of such employment is governed exclusively by such law. T. C. A. § 50-908. Mr. Dawn being thus barred from maintaining a tort action against Eastman for his injury, *Liberty Mutual Inc. v. Stevenson* (1963), 212 Tenn. 178, 182, 368 S. W. (2d) 760, the third-party plaintiff Essex has no right of contribution from Eastman. Uniform Contribution Among Tort-Feasors Act, T. C. A. §§ 23-3101, et seq. And, for the same reason, the derivative claim of the plaintiff, Mrs. Dawn, for loss of her husband's consortium, T. C. A. § 25-109, is likewise barred; and such third-party plaintiff has no right of action for contribution against Eastman on that account. *Idem.*; *Nichols*

v. Benco Plastics, Inc., ___ Tenn. ___, 469 S. W. (2d) 135, 138 [4].

The fact that the employment relation of Mr. Dawn and Eastman is governed by the Tennessee Workmen's Compensation Law, *supra*, does not encompass or
[fol. 4] limit the third-party actions herein, if the third-party plaintiffs are entitled to indemnity under a substantive right recognized by Tennessee law. *Roberson v. Bitner*, D. C. Tenn. (1963), 221 F. Supp. 279, 281 [1]. Tennessee recognizes the substantive right of indemnification between joint tort-feasors in situations wherein a passive tort-feasor seeks indemnification from an active tort-feasor. *Roberson v. Bitner*, D. C. Tenn. (1963), 218 F. Supp. 764, 766, quoting from *Cohen v. Noel* (1933), 165 Tenn. 600, 56 S. W. (2d) 744, 745.

If the plaintiffs obtain a judgment against the defendants on the basis of one or more acts of negligence in connection with the sale and distribution of their equipment, this would necessarily involve more than passive negligence on the respective parts of the defendants and third-party plaintiffs Essex and Process. *Lopez v. Brackett Stripping Machine Company*, D. C. Ill. (1969), 303 F. Supp. 669, 670 [1]. The plaintiffs' claims of breach of warranties do not involve an issue of active-passive negligence. *Schripper v. Lockheed Aircraft Corporation*, D. C. N. Y. (1968), 278 F. Supp. 743, 746 [7].

[fol. 5] As stated, Eastman is already liable to the plaintiff Mr. Dawn and compensating him under the Tennessee Workmen's Compensation Law. There is no claim by the third-party plaintiffs that Eastman agreed expressly to indemnify either Essex or Process against their own breach of duty. The third-party defendant Eastman owed no obligation to the third-party plaintiffs in con-

nection with Eastman's use of the equipment involved, Eastman's duty in connection therewith being confined to that it owed Mr. Dawn and his fellow employees. *Auld v. Globe Indemnity Company*, D. C. La. (1963), 220 F. Supp. 96, 98-99. Even if Eastman is guilty of all the acts of negligence imputed to it by the allegations of the third-party complaints, still it breached no implied duty of care owing to the third-party plaintiffs. *Ibid.*, 220 F. Supp. at 99. As Eastman is solely liable to the plaintiff Mr. Dawn under the Compensation Law, the third-party plaintiffs are not permitted to implead Eastman. *Schwab v. Erie Lackawanna Railroad Co.*, C. A. 3d (1971), 438 F. (2d) 62, 66, cited in *Millard v. Municipal Sewer Auth. of Twp. of Low. Makefield*, C. A. 3d (1971), 442 F. (2d) 539, 541 [3].

[fol. 6] From all of this the Court concludes that where, as here, the plaintiffs have sued the defendants for active acts of negligence and that, but for the existence of the Workmen's Compensation Law, the plaintiffs could have sued the defendants and the third-party defendant as joint tort-feasors, Tennessee law does not permit a suit over against the third-party defendant on the ground that it was also guilty of some similar or equally causative, but different, negligent acts, which might also have constituted a proximate cause of the injury to the original plaintiffs. *Cf. General Dynamics Corporation v. Adams*, C. A. 5th (1965), 340 F. (2d) 271, 281 [14, 15]. It thus appearing that the third-party defendant Eastman could under no theory be liable to the third-party plaintiffs Essex and Process " * * * for all or part of [the plaintiffs' claims] against * * * " the defendants and third-party plaintiffs, Rule 14 (a), *supra*, the motion of the third-party defendant Eastman for a judgment on the pleadings hereby is GRANTED, and the respective third-party actions of Essex and Process hereby are

DISMISSED.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

APPENDIX B

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

CIVIL ACTION NO. 2809

JERRY DAWN, ET UX.,
Plaintiffs,
v.
UNITED STATES FIDELITY AND GUARANTY COMPANY, ET AL.,
Intervening Plaintiffs,
v.
ESSEX CONVEYORS, INC.,
Defendant, Plaintiff-by-cross claim and Plaintiff-by-counterclaim,
and
PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,
Defendant, Defendant-by-cross-claim and plaintiff-by-counterclaim,
v.
TENNESSEE EASTMAN COMPANY,
Defendant-by-counterclaims.

Appendix B

MEMORANDUM OPINION AND ORDER

(Filed September 6, 1973)

The defendant-by-counterclaims Tennessee Eastman Company moved, *inter alia*, for a judgment on the pleadings between it and the plaintiffs-by-counterclaim Essex Conveyors, Inc. and Process Equipment Engineering Company, Inc., respectively, relating to the respective counterclaims of the latter. Rule 12(c), Federal Rules of Civil Procedure. For the reasons stated in this Court's memorandum opinion and order herein of March 19, 1973 such motion has merit.

As was stated in 3 Products Liability (Frumer and Friedman) 716, §44.02 [3][d] as the general rule: "***[I]f the manufacturer was liable at all to the injured person, the manufacturer would necessarily have been actively negligent and therefore not entitled to indemnity. ***" The plaintiffs-by-counterclaim have no action for indemnity against the defendant-by-counterclaim because of the absence of a common tort liability among them unto the plaintiff Mr. Dawn. *Scarbrough v. Murrow Transfer Company*, D.C. Tenn. (1967), 277 F. Supp. 92, 96 [7]. See also *Union Carbide Corporation v. Dunn Brothers General Contractors, Inc.*, D.C. Tenn. (1968), 294 F. Supp. 704, 707 [7, 8]; *Chamberlain v. McCleary*, [fol. 3] D.C. Tenn. (1963), 217 F.Supp. 591, 597-598 [7]; *Birdsong v. General Motors Corp.*, D.C. Pa. (1951), 99 F. Supp. 163, 165 [4], [5].

Accordingly, judgment on the pleadings will ENTER for the defendant-by-counterlcaims Tennessee Eastman Company against the respective plaintiffs-by-counterclaim Essex Conveyors, Inc. and Process Equipment Engineering Company, Inc.

ENTER:

/s/ C. G. Neese

(C. G. Neese)

United States District Judge

APPENDIX C

[fol. 1] Nos. 73-2174 through 73-2179

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JERRY DAWN, ET UX,
Plaintiffs,
UNITED STATES FIDELITY AND GUARANTY COMPANY and EASTMAN KODAK COMPANY,
Intervening Plaintiffs,

ESSEX CONVEYORS, INC.,
Appellant,
and
PROCESS EQUIPMENT ENGINEERING COMPANY, INC.,
Appellant,

TENNESSEE EASTMAN COMPANY, A DIVISION OF EASTMAN KODAK COMPANY,
Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northeastern Division.

Decided and Filed June 20, 1974.

Appendix C

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

[fol. 2] PECK, Circuit Judge. The appeals in this diversity case arose out of a products liability action to recover damages for personal injuries sustained by an employee in a Tennessee industrial accident that occurred in 1970. The plaintiffs, Jerry Dawn, and his wife, Wanda Dawn, filed a complaint against Essex Conveyor, Inc. (hereinafter "Essex") and Process Equipment Engineering Company, Inc. (hereinafter "Process"), appellants herein, alleging that they negligently designed and manufactured a "senior skip hoise dumper" used by Mr. Dawn's employer, Tennessee Eastman Company (hereinafter "Eastman") in its Kingsport, Tennessee plant, and that due to the alleged faulty design and manufacture, the dumper portion of the hoist fell on and grievously injured Dawn.

Essex and Process responded by filing general denials. The Eastman Kodak Company (Eastman's parent corporation) and its compensation insurance carrier filed an intervening complaint against Essex and Process to protect their statutory subrogation rights against any recovery by the plaintiffs in order to recoup the value of workmen's compensation benefits paid on Eastman's behalf. Appellants filed third-party complaints against Eastman for indemnity on the theory of active-passive negligence under the law of Tennessee, but the district court, by order entered March 19, 1973, dismissed the third-party complaints. Appellants moved the court to alter and amend that order to permit an immediate appeal, but the court did not act on the motion. Subsequently, they filed cross-claims against each other and counterclaims against Eastman for indemnity. By order of September 6, 1973, the

district court entered judgment on the pleadings in favor of Eastman on the counterclaims.

The main action involving the Dawns' claim against Essex and Process and the cross-claims between the appellants came on for jury trial in October 1973. Eastman did not participate in the proceedings. After eight days of trial, the litigants announced to the court that a settlement of all claims and cross-claims had been reached,

[fol. 3] but that the agreement did not affect any possible third-party actions or counterclaims against Eastman.

Appellants requested that the court make final its March 19 and September 6 orders. The court, after noting that the third-party complaints and counterclaims had been disposed of by the above orders, and that all other claims and cross-claims had been settled, determined that "all the respective claims as to all the parties . . . have been finally determined or otherwise disposed of," and entered final judgment. Essex and Process each perfected separate appeals from the March 19 and September 6 orders, and from the final judgment. All six separately docketed appeals involve the same issue, were consolidated in the briefs and on oral argument, and will be considered as one herein.

The issue before us is simply stated: Can an employer who has paid an injured employee benefits due under the Tennessee Workmen's Compensation Law, T.C.A. § 50-901 et seq., be liable for indemnity to a third-party tortfeasor under the Tennessee active-passive negligence doctrine?

In this diversity action our answer to the above question must be formulated in accord with the dictates of Tennes-

see law. *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938). Unfortunately, no Tennessee appellate court has addressed itself to this issue, leaving for us the task of trying to determine what result would be reached by a Tennessee appellate court if it were deciding this case. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1941). We are not, however, without guidance in this endeavor. This question has been the topic of discussion in at least three case notes in the Tennessee or Vanderbilt Law Reviews.[1] Other jurisdictions have wrestled with this or similar issues.[2] And finally, there have been [fol. 4] four opinions rendered by federal district courts sitting in Tennessee (not including the decision in the instant case) which have undertaken to anticipate the ruling of the appellate courts of Tennessee on this question.

The holdings in the first three district court cases referred to above were summarized in the latest decision, from which we quote at some length.

> "The earliest of these [decisions] is *Roberson v. Bitner*, D.C. Tenn. (1963), 221 F. Supp. 279. In an opinion by the author of this opinion, it was held that the Tennessee Workmen's Compensation Law does not bar third-party actions if the respective third-party plaintiffs are found to be entitled to indemnity under

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[1] 13 Vand. L. Rev. 772 (1960); 24 Tenn. L. Rev. 1068 (1957); 4 Vand. L. Rev. 379 (1951).

[2] For a compilation of cases prior to 1956, see 24 Tenn. L. Rev. 1068 (1957). Examples of more recent cases: **Cacchillo v. H. Leach Machinery Co.**, 305 A.2d 541 (R.I. 1973); **Lampada v. State Sand & Gravel Co.**, 58 Wis.2d 315, 206 N.W.2d 138 (1973); **Kamali v. Hawaiian Elec. Co.**, 54 H. 153, 504 P.2d 861 (1972); **Dale v. Whiteman**, 388 Mich. 698, 202 N.W.2d 797 (1972); **Leech v. Georgia-Pacific Corp.**, 259 Or. 161, 485 P.2d 1195 (1971); **Hilzer v. MacDonald**, 169 Col. 230, 454 P.2d 928 (1969).

some substantive right recognized by Tennessee law. *Ibid.*, 221 F. Supp. at 281 [1]. Four years afterward, (now Chief) Judge Frank W. Wilson, of the Eastern District of Tennessee, declined to follow *Roberson*, *supra*. *Smith v. Illinois Central Railroad Company*, D.C. Tenn. (1967), 263 F. Supp. 70, 72. The following year, (now Chief) Judge Frank Gray, Jr., of the Middle District of Tennessee, reviewing the two aforementioned precedents, opted for the *Smith*, *supra*, rule. *Union Carbide Corp. v. Dunn Bros. General Contractors, Inc.*, D.C. Tenn. (1968), 294 F. Supp. 704, 706-707 [4-8]. No appeal appears to have been taken from any of those adjudications." *McCoy v. Wean United, Inc.*, Civil Actions Nos. 3098 & 3099 (E.D. Tenn., filed April 25, 1974).

In *McCoy*, Judge Charles Neese chose to overrule his earlier *Roberson* decision and to follow the *Smith* and *Union Carbide* opinions. He did so because he concluded that "Tennessee courts would hold that the Tennessee Workmen's Compensation Law, T.C.A. § 50-908, bars . . . third-party actions . . . ." *McCoy*, *supra*. For reasons hereinafter appearing, we reach the same conclusion.

[fol. 5] The district court in the instant case dismissed the third-party complaints and counterclaims for indemnity because appellants would be unable to meet the requirements of the active-passive negligence doctrine advanced as the basis for Eastman's liability. This doctrine, the court noted, required that appellants prove, among other things, that their own negligence was only passive and that they shared, with Eastman, a common tort liability to plaintiffs. The court was of the opinion that these burdens could not be met because (1) any

judgment against appellants arising from allegations of plaintiffs' complaint would necessarily involve more than passive negligence, and (2) under Tennessee law (Workmen's Compensation Law) Eastman was not liable to plaintiffs in tort and thus no common tort liability could exist. We express no opinion as to the validity of the district court's first theory, but we are in accord with the rationale expressed in the second.

The Tennessee Workmen's Compensation Law, like similar compensation laws in other states, replaced with statutory benefits all common law rights an injured employee might have had against his employer for work related injuries. T.C.A. § 50-908 provides as follows:

> "Right to compensation exclusive.—The rights and remedies herein granted to an employee subject to the Workmen's Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death."

Nearly every workmen's compensation law contains an equivalent section. In interpreting the above section the Tennessee Supreme Court has held that "[t]his Act constitutes a complete substitute for previous remedies in tort on the part of an employee. . . ." *Liberty Mutual Ins. Co. v. Stevenson*, 212 Tenn. 178, 182, 368 S.W.2d 760, 762 (1963). There can be no doubt that plaintiffs herein could not have brought a tort action against Eastman.

[fol. 6]

Essex and Process propose an indemnity action against Eastman on the basis of the active-passive negligence

theory. While such actions are generally permitted under Tennessee law, *Cohen v. Noel*, 165 Tenn. 600, 56 S.W.2d 744 (1933), indemnity is allowed only where both the active and the passive tortfeasors share a common liability in tort to the injured party. The logic of this requirement is manifested in the following summary of the theory behind indemnity actions: "[I]ndemnity . . . shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." Prosser, Law of Torts, § 51 Indemnity, p. 310 (4th ed. 1971). As the court in *Scarbrough v. Murrow Transfer Co.* stated, "While an action for . . . indemnity will lie in Tennessee as between joint tortfeasors, . . . no such action will lie in the absence of a common tort liability unto the injured party." 277 F. Supp. 92, 96 (E.D. Tenn. 1967). Here, there was no common liability because Eastman was not liable to plaintiffs in tort.

The above argument, that common liability is required in indemnity actions, is often employed by courts in those jurisdictions which have rejected contribution and indemnity suits against employers bound by workmen's compensation laws.[3] It has been suggested by some writers that the common liability demanded in contribution cases (which courts dealing with indemnity questions have relied upon to a great extent) should not be similarly demanded in indemnity actions. While it is true that the problems encountered in a situation where there is contractual indemnity are substantially different from those faced in a contribution situation, indemnity under the active-passive negligence theory is more "akin to contribution between tortfeasors, and should be governed in this regard by the

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[3] 13 Vand. L. Rev. 772, 783, and cases cited therein.

[fol. 7] principles applied to contribution." *Chamberlain v. McCleary*, 217 F. Supp. 591, 597 (E.D. Tenn. 1963).

The decision in this case in no way affects the validity of third-party actions for indemnity based upon express or implied contract. We note, in this regard, that the majority of jurisdictions which have considered the question have held that compensation laws do not bar such actions. *See, e.g., Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959) (interpreting Tennessee law). And, in fact, that is the result reached by this Court in *Brogdon v. Southern Ry. Co.*, 384 F.2d 220 (6th Cir. 1967), where we had occasion to deal with the same section of the Tennessee Workmen's Compensation Law.

We conclude that third-party indemnity actions under the active-passive negligence doctrine are barred by T.C.A. § 50-908, and the judgment of the district court dismissing their indemnity claims is affirmed.